Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU

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On 17 February 2020, the *Oberlandesgericht* Karlsruhe passed a decision in a surrender case that we expect to shape the future of the *LM*-test (Ausl 301 AR 15/19; for a first analysis, see here). Its decision can be seen not only as a result of Luxembourg's unworkable *LM* test but also as an acknowledgement of the effect of Poland's muzzle law on the independence of its judiciary. Shortly after, *Rechtbank* Amsterdam engaged with this decision, thus making it more likely that the CJEU will have to move forward and develop its test into a more meaningful one.

Not waiting for an answer: Oberlandesgericht Karlsruhe (17 February 2020)

As reported by Maximilian Steinbeis the same *Oberlandesgericht* Karlsruhe that ignored the *LM*-take on the EAW in 2019 to instead apply a traditional extradition-type logic, took the muzzle law into consideration when deciding on yet another surrender request. This time however, the court did not revert to traditional forms and practices of extradition. Instead, it attempted to apply the *LM*-deficiency test. The existence of systemic rule of law issues was not debated. The novelty as compared to other domestic cases applying the *LM*-test concerns the second prong. The court asked eight questions about the situation on the ground from the issuing Polish court and three from the Polish Ministry. However, and this is the ground-breaking part, the Karlsruhe court did not wait for the answers to arrive but suspended the surrender proceedings altogether. Apparently, it did so assuming that the answers from the Polish authorities would not change its assessment. One might ask what use the exchange between national courts is, if the executing court does not wait for the answer of the issuing court.

But let us turn to the issues that made the *Oberlandesgericht* Karlsruhe suspend the case, rendering the second prong of the *LM*-deficiency test meaningless. The main reason for suspension is the alleged involvement of two influential Polish nationals who are said to have bribed witnesses to engage in perjury and to have commissioned others to assault the suspect. What we can conclude from the decision is that the requested person does not need to be a political enemy of the government in order to satisfy the second prong of the deficiency test, as opposed to what the AG Opinion propagated in paragraph 113. (The AG's interpretation is problematic among other reasons because requests against political enemies could anyway be refused according to Recital 12 FD EAW.) But some form of involvement

of powerful people helps to have the procedure suspended sooner, without going through the second prong of the *LM* test.

The question arising is how severe the political interference, or the involvement of "influential persons" needs be in order to have a surrender automatically suspended. A politician discussing an ongoing case would probably not do. Remember that the Deputy Minister of Justice calling Artur Celmer (the suspect in *LM*) "a dangerous criminal", in violation of the principle of the presumption of innocence, was not considered to be a sufficient interference. The Polish courts' answer to that incident was – and it satisfied the executing Irish court – that the judiciary is not affected by statements coming from the executive, since there is separation of powers in Poland. That seems to be wishful thinking in the light of later developments. Still it suggests that "influential people" have to be more involved in the criminal proceeding in order to have an impact on the suspension of surrender. The political element needs to be somewhere between being a political opponent and a politician commenting on a case.

Once such an element is there, as the Karlsruhe court held in Point IV of the judgment, it is probable that "in case of surrender, the suspect would be exposed to a real risk of a violation of his right to a fair trial". The court underpins this by the fact that "the forum that is called upon to deliver a decision – as the suspect claims in the present case – would also have to decide on how these supposedly influential people impacted the finding of the truth in the criminal proceeding. Should however Polish criminal judges have to seriously expect disciplinary sanctions (for themselves) only as a result of assessing pieces of evidence, they would not be entirely independent, so that one could not talk about a fair trial anymore." Karlsruhe does not believe that this assessment could be changed by the Polish responses: "Rather, one would have to wait for further developments in Poland and the jurisprudence of the CJEU." In other words, the Karlsruhe court seems to agree with our assessment that in light of CJEU judgments confirming systemic violations of the rule of law, mutual trust must be rebutted, and consequently suspended (and that the opinion of the judges in the Member States concerned should not be awaited).

Less importantly, the Karlsruhe court mentions certain additional specificities of the case which justify immediate suspension of the EAW. In Part IV the decision states that the crime at issue is of lesser gravity. As we learn from Part II.1., it is fraud that can be sanctioned according to the Polish Criminal Code by up to 8 years imprisonment. The details are not given. But between the lines Karlsruhe gives the impression that it believes for this to be a political case indeed. As a consequence, the suspect stays in Germany, and is to be released from detention with immediate effect (Tenor 2). Karlsruhe makes a clear choice and sends a clear message. And in our view the right one.

Towards stricter review: Rechtbank Amsterdam's rulings part 2 (March 2020)

In two rulings of 24 March and one of 26 March 2020 (ECLI:NL:RBAMS:2020:1896, 24 March 2020; ECLI:NL:RBAMS:2020:1931, 24 March 2020; ECLI:NL:RBAMS:2020:2008, 26 March 2020) *Rechtbank* Amsterdam has set the stage for a next step in its thinking. It seems to move in the direction of stricter review. In a reasoning that is identical in the three cases, the court introduces the entry into force of the muzzle law in February 2020 as a new fact that requires reassessment of the way in which *LM* can and should be applied. Referring to the ruling of Karlsruhe, but also to the CJEU ruling in *AK*, the hearing on interim measures of the CJEU in Case 791/91 (for a report, see here; since decided on 9 April), but also to a joint urgent opinion of the Venice Commission and DG human rights and the rule of law of the Council of Europe of 26 January on the draft muzzle law, it halted proceedings and instructed the prosecutor and the defence to reflect on the significance of these developments on the questions in the *LM*-test. The parties will currently be working on their replies.

LM: from "Later, Maybe" to "Let's Move"?

The Karlsruhe-Amsterdam engagement with Luxembourg's *LM* (and with each other) can be read at four different levels and is interesting at each.

First, most obviously, while politicians talk (and talk), judges inevitably need to get on with their job in individual cases and find themselves confronted with the concrete consequences of a rule of law implosion within parts of a common legal system. They need to grapple, in legal terms and from the perspective of individual cases, with the concrete consequences of what is happening in Poland and what is not happening to deal with it at the political level. Although it seems strange to applaud any actor for doing its job in upholding rule of law standards, we should do so – it is lonely in that place. National and European judges consistently stepping up to the plate is really the only ray of light in these troubling times.

Second, even if judges at least deal with the problem, dilemmas they confront are hard. Striking a workable balance between protecting individual rights and saving the core Union law principle of mutual recognition applicable much more widely than just vis-à-vis the EAW and just vis-à-vis Poland remains somewhat elusive. For that reason, it is perhaps disappointing, but not all that surprising, that Luxembourg has so far been hesitant to provide immediately actionable guidance to national judges. As we see it, the CJEU has instead simply reformulated the problem in a convoluted two-pronged/three-step test and relocated solving that problem to national judges (aka *LM*), in an attempt to buy some time in the hope that dark clouds would blow over. No serious observer was expecting that to be sustainable for long barring a dramatic turn-around in Poland. That has not come. New realities require judicial readjustment.

Third, the Karlsruhe-Amsterdam engagement with Luxembourg's *LM* shows how much the political context and stakes echo between the lines. Although the fact that different domestic courts often refer to each other's EAW/Poland practice (and not only Luxembourg) can already be read as a sign of judicial solidarity and of common worry about the rule of law, one can also sense the constant temptation once again to kick the problem down the road. Indeed, it will take considerable courage for any judge, but especially for domestic judges, to draw conclusions with major systematic repercussions that for scholars like us have been evident for a while – that, at this stage, a transfer of a suspect to Poland (and Hungary) under an EAW is incompatible with Union law, given that judicial independence is no longer guaranteed, in *none* of the cases dealt with there. The time has come to translate factual reality into a legal one. National judges should therefore ask Luxembourg again, in the form of preliminary questions, how they should deal with EAWs from Poland in light of new realities. They should ask about the sustainability of *LM*. In reply, the CJEU line should be to prioritise protection of Union citizens as long as that cannot be provided in a particular Member State. It should collapse question 2b into the answer to question 2a. If there is a systematic problem, by definition there is an individual problem too. Protecting minimum standards cannot be squared with mutual trust that, based on the Court's *own* Polish judicial independence case law, is currently unwarranted, whatever the political and practical ramifications. Almost unconditional mutual recognition made and still makes sense for wine, cheese and diplomas. But these don't have human rights and human dignity. False equivalences often prevalent in discussions about this principle should be avoided in the application and interpretation of mutual recognition. Multi-speed is an option.

Fourth, and finally, judges moving to draw these legally inevitable conclusions (hopefully very swiftly!) may also bring the rule of law realities full circle to national politicians – and place them in a new, more urgent light for them. For national politicians acting in the EU, a failure to act politically with regard to Poland and Hungary will become a clear(er) *domestic* problem. Having to deal with 'other Member States'' cases in 'your own' system; burdening 'your own' penitentiary system and judges who, correctly, refuse to transfer anyone to undemocratic and illiberal Member States (but whose representatives sit at the same Brussels negotiation table smoke-screening and delaying) – in short, having to deal with 'their' problem 'yourself'– may put in much sharper relief the domestic political dimension to the reality that interconnectedness in the Union works both ways. Protecting the rule of law in any Member State is every elected politician's business and own, direct responsibility. Change starts with the person looking back at you in the mirror.

Be a judge (and a politician) about it

As Professor Paul Craig recently said at a workshop in London, the *LM* test will one day be regarded as a step in a continuous learning process. Now it seems, as many of us suspected and hoped for, that judicial dialogue between Luxembourg and national courts will likely push the CJEU to move forward and develop its test into a more meaningful one. Should this not happen, EU criminal justice – to a large extent based on mutual trust – will collapse. And make no mistake: diffidence might well quickly spill over to other branches of law. This is so because the rule of law,

including specifically the principle of judicial independence, is equally important for the single market, for an investment-friendly environment and for the Eurozone. Not acting decisively to protect legal and political foundations, both at the political and the judicial level, will ripple far beyond the AFSJ and endanger the whole European project.
